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THE EVOLUTION OF THE CONCEPT OF RISSA IN MALTESE LAW WITH REFERENCE TO SECTION 237 OF THE CRIMINAL CODE

As a manifestation of violence, brawls have always been one of the most common problems with which the authorities that be have had to deal with in order to maintain the public peace. The concept of *rissa* or accidental affray has therefore by necessity developed since early times as a criminal offence, the typical *actus reus* of which would have consisted exclusively in participation in such a fight; times have changed to such an extent that nowadays such an offence exists neither under English nor under Maltese law, but modern regulation will be analysed later on.

In the early codes of law enacted by the Knights of St. John, *rissa* as an offence does not appear immediately although much attention is given to duels. Reference is made in particular to the *Pragmaticæ Rhodiæ* of 1509, enacted in Rhodes, the *Statuta et Ordinationes* of Grandmaster de L'Isle Adam, enacted on the 3rd of September, 1533, the *Pandectæ et Ordinationes* of D'Omedes, dated 1553, the so-called *Codice di Verdala* of 1593, and the *Prammatiche Magistrali* enacted by Lascaris in 1640, together with the 1666 additions of Cottoner. Incidentally, under Italian law, duel could possibly be considered as *rissa*, if one were to agree with Carrara[1] and Manzini,[2] who are of the opinion that a fight between two individuals is enough to constitute a breach of Section 588 of the Italian Penal Code, but the concepts and considerations involved are of little relevance to the concept of *rissa.*

The earliest application of the word *rissa* in a Maltese legislative context is to be found in the *Prammatiche Magistrali*, compiled by Massimiliano Balzano at the request of a commission appointed by Grand Master Nicholas Cottoner, and enacted by Grand Master Gregorio Caraffa in 1681. *Titolo Vigesimo 1º*

deals with offences against the person, and VI deals with homicide committed in prison, including *"qualunque homicidio etiam casuale, et accidentale,* ***come sequito in pura rissa senz'animo di ammazzare****"*, which it punishes with death. In X, however, *rissa* is dealt with exclusively:

X

> Succedendo qualsisia tumulto, o rissa tra più persone, quali daranno di mano all'armi, come sone spade, pugnali, coltelli, o altre simili, essendovi più d'uno per parte, incorrano I contraventori alla pena di cinque anni di Galera, dando facoltà ai Giudici d'alterare, et accrescere detta pena, attese le circonstanze del caso, e numero di persone.

Here we find that what was especially punished was armed participation, participation with what would be considered as arms proper. The same provision was re-enacted by Grandmaster de Vilhena in the 1725 *Leggi e Constituzioni Prammaticali*, better known as the *Codice di Manoel*, with minor orthographical corrections. The year 1784 then saw the enactment of the *Dritto Municipale di Malta*, better known as the *Codice de Rohan*. *Rissa* is exhaustively dealt with in Book 5, Chap. 3:

VIII

> Quante volte nella rissa accidentale seguirà ferimento grave, o debilitazione di qualche parte del corpo cogli urti dati, pugni, o con colpi di legno, o pietre; il primo che avrà messo le mani sull'altro, ovvero il provocante sarà punito colla pena del servigio alle opere pubbliche con catena per un anno, ovvero ad anni tre o più di galera, oppure all'esilio a tempo o in perpetuo, secondo le qualità delle persone, avuto riguardo alla maggiore o minore ferita o debilitazione di membro; ed in oltre dovrà risarcire tutt'i danni, spese, ed interessi alla parte lesa: e non costando chi abbia dato principio alla rissa, o chi sia stato il provocatore; ambidue soggiaceranno alla pena di carcere per mesi due, e colui che avrà leso l'altro, dovrà pagargli i danni, ed interessi.

IX

Nella stessa pena, e nell'obbligo medesimo incorreranno tutti quei, che saranno stati corrissanti, e saranno per le spese e danni tenuti in solido.

X

Chiunque nelle risse, eziandio accidentali, quantunque insorte tra altri, prenderà in mano per rissare armi proibite, così da vicino come da lontano, incorrerà nella pena di galera per anni dieci; quante volte non sarà sequito alcun ferimento, e non sarà stato autore della rissa: nè potrà suffragargli, per esimersi da tale pena, la licenza di ritenere le dette armi, o che non si fosse servito di tali armi proibite.

XI

Succedendo qualsisia tumulto o rissa tra due persone, che daranno di mano alle armi proibite, essendovi più d'uno per parte, soggiaceranno tutti alla pena di galera per anni dieci; purchè non ne fosse sequito ferimento od altro danno.

XII

Se però in ambidue i casi annoverati ne' *preced. X. e XI.* sarà sequito ferimento o altro danno, la pena sarà di galera a vita.

XIII

Ma se tale tumulto o rissa tra più persone, succederà dando di mano a pietre o legni, e non sarà seguito danno notabile; la pena sarà di galera per anni tre sino a cinque: ed al giudice s'accorda la facoltà di commutarla per lo stesso tempo o nel servigio delle opere pubbliche, o nell'esilio, avuto riguardo alle qualità delle persone, ed alle circostanze del caso.

As can be seen, the *Codice de Rohan* treated the problem from various points of view, with different punishments for the provocator, for any person found to have actually harmed the victim, for participators with arms proper and participators with arms improper, and even for cases where no arms improper are used and no bodily harm occurs. The criminal law provisions of the *Dritto Municipale* remained in force until the enactment by Order-in-Council of the Bonavita Criminal Code in 1854, yet it seems that these provisions had long since ceased to be applied; such was the case, at least, in the four judgments regarding *rissa* reported in the first collection of law reports published in Malta; the 1839 and 1840 *Collezione di Decisioni dei Tribunali di Malta*, edited by Sir Antonio Micallef. In Decision XXIX,[3] enunciated by the Criminal Court presided over by Dr. Gio. Batta Satariano and Dr. Pasquale Grungo, Judges of Her Majesty, on Tuesday, 12th November, 1839, Giovanni Carabott of Zejtun was found guilty of *"ferimento commesso in rissa e nel calore dell'iracondia"*, and condemned to *"servizio nelle opere pubbliche con catena per anni tre."* In this report, no mention is made either of the circumstances of the case or of the law applied.

In a subsequent judgment,[4] delivered on Saturday, 16th November, 1839, by the Criminal Court composed in the same manner, Francesco Mercieca, from Gozo, was accused of *"furto e* [...] *ferimento grave e pericoloso commesso in rissa, ma senz'animo di uccidere."* Of particular interest is the editorial commentary, by Sir Micallef:[5]

OSSERVAZIONE.

(1) La pena del furto è stabilita nel 1 del proclama del 26 aprile 1825 riportata nella prima osservazione alla decisione XXX e **per quel che concerne la pena applicabile all'altro delitto, come pare, la corte, stante il difetto di una legge che la potesse regolare, ha dovuto arbitrare, giacchè secondo il diritto municipale lib. 5 cap. 3 8 quante volte nella rissa accidentale siegue ferimento grave o debilitazione di qualche parte del corpo cogli urti dati, pugni, o con colpi di legno o pietre, il primo che mette le mani sull'altro deve essere almeno punito colla pena del servizio alle opere pubbliche con catena per un anno, e giusta il 12 dell'istesso capo, seguendo il ferimento con armi proibite, la pena è di galera a vita.**

Although the Editor quotes the *Code de Rohan*, the Court does not seem to have made any mention of its provisions, and in fact does not apply the punishment laid down in it, preferring to apply its own discretion.

The same kind of offence was contemplated in two cases the following year, both of which were decided by a Criminal Court composed of the same two judges as in the preceding cases, but this time presided over by Sir Ignazio Gavino Bonavita himself, the (future) compiler of the Criminal Code. In these two cases we find a much more detailed narration of the events, so that it is easier to assess what was meant by the term *rissa accidentale*. In the first of these two cases,[6] decided on Monday, 17th August, 1840, Natale Xerri was accused of *"ferimento pericoloso e grave commesso senza giusta e ragionevole causa"* upon the person of Francesco Micallef, consisting in three bodily wounds caused by a knife. The Crown Advocate produced as eye witness P.C. Giovanni Borg, who had seen the accused and Micallef *"azzuffati dibattersi per terra, il prigioniere avendo in mano un coltello, ed il Micallef una pietra, e dando furiosamente colpi l'uno all'altro reciprocamente."* This happened after a drinking session in a *bottega* in Birkirkara, and the reason for the fight was not determined with certainty, so that the Court found the accused *"reo nel ferimento espresso nella denunzia e commesso con coltello, ma in rissa, ed essendo esso Natale in istato di qualche grado di ebrietà."* Regarding the law to be applied, the following passage gives the views of Sir I.G. Bonavita:

> **Sentiti poi i defensori sull'applicazione della legge, il presidente rilevò, che il caso non cadendo sotto alcuna sanzione dello statuto patrio la pena rimaneva rimessa al prudente arbitrio della corte,** e che stante le scuse dichiarate e nascenti dalle circostanze della rissa e dal grado di ebrietà del prigioniere al tempo del commesso delitto, la corte si sarebbe determinata ad una pena più mite di quella che stava per applicare, se nel caso non concorresse la circostanza aggravante del coltello, egualmente dichiarata nella decisione del fatto. E quindi la corte condannò il prigioniere al servizio nelle opere pubbliche con catena al piede e senza stipendio per un anno.

The second of these two cases[7] was decided on Friday, 27th August 1840, by a Criminal Court composed in the same manner as the preceding one. In it,

Giuseppe Borg was charged with *"attacco personale e ferimento pericoloso e grave in persona di Carmelo Bonnici"*, which consisted of a wound in the abdominal region produced by the defendant's knife, which resulted in Bonnici's death thirty hours later. The Court decided the case as follows:

> "La corte dichiara di costare della reità del prigioniere Giuseppe Borg di ferimento pericoloso e grave in persona di Carmelo Bonnici in consequenza del quale ferimento esso Bonnici cessò di vivere: commesso tale ferimento con coltello volgarmente detto serratore in una rissa provocata dal suddetto Bonnici e ripetutamente da lui attaccata con nuove e gravi provocazioni, dopo di essere stati separati da altri i due corrissanti, ed avendo l'accusato inflitto il ferimento, mentre egli agiva sotto l'impulso del dolore derivato da una seria morsicatura cagionatagli nel pollice della mano destra dal ferito nell'atto della rissa." Deciso in questi termini il fatto, e sentito l'avvocato della corona, il quale allegò che **la legge nel caso come era stato dichiarato rimetteva la pena alla prudenza della corte,** come pure l'avvocato per la difesa il quale insistè perchè non essendo risultato, che il prigioniere avesse agito con dolo, si dovesse al più decidere, che la carcerazione fin'allora sofferta dovesse cedere in luogo di pena, il presidente rilevò, che dalla dichiarazione della corte pronunziata sul fatto, venendo escluso il moderame dell'incolpata difesa, non poteva dirsi che il prigioniere avesse agito senza dolo, ma all'incontro bisognava considerarlo reo del ferimento a carico suo dedotto nell'atto di accusa, sotto le circostanze bensì espresse in quella dichiarazione - che queste circostanze, le quali per ciò che concerne il piacere del prigioniere, consistevano nel dichiarato impulso del dolore e della dichiarata rissa, costituivano veramente una scusa del delitto, ma giammai la non imputabilità del fatto, e quindi potevano come circostanze le quali non escludevano il dolo, ma si bene in qualche maniera lo attenuavano, operare in mitigazione della pena, che deve essere applicata per un ferimento grave sequito

> dalla morte, come fu espresso nella decisione del fatto, e considerato sotto tutte le circostanze del momento in cui fu commesso, e non mai avere per effetto la totale esenzione dalla pena, e quindi pronunziò la seguente sentenza della corte "La corte condanna il prigioniere Giuseppe Borg al servizio nella opere pubbliche con catene al piede e senza stipendio per anni due."

From these four judgments an idea may be made of the concept of *rissa* as obtaining before the introduction of Section 227 of the 1854 Order in council. First of all, whereas participating in a *'rissa'* under Italian law or even in an 'affray' under English law constitutes an offence in itself, nothing of the sort is envisaged in these cases; this also happens to be the main point of difference between the corresponding provision in the Codice Rocco and that in the Codice Zanardelli. Clearly, in these instances the fight was only taken into account in order to determine the degree of criminal intent, or *'dolo'*, yet the impression is given that, *'dolo'* being established, the fact that the offences were committed during a fight constituted a valid ground of excuse. This point is in fact made by Carrara[8] in relation to the concept of *rissa* under the old Italian Code.

Another interesting feature of this concept is the semantic meaning attributed to the word itself; there doesn't seem to be any difference between the word *'rissa'* as used in these cases and the word 'fight', although the meaning attached to it in Italian law equates it rather with the word 'brawl', implying participation by more persons. A comparison with the concepts of *'rissa'* under Italian law and 'affray' under English law will illustrate my meaning. According to Antolisei,[9] *'rissa'* implies more than a simple *"alterco violento fra due individui"*. Although Manzini[10] and Pannain[11] are of the opinion that the participation of two persons is enough to constitute the said offence, according to others, such as Antolisei[12] and Di Vico,[13] at least the involvement of three persons is required. Masi goes further; according to him, at least two groups of persons must be opposed with at least two individuals per group, so that one can only speak of *'rissa'* when at least four persons are fighting, equally divided.

It is however to be kept in mind that in the cases discussed above, the participation in the affray is not considered as an offence in itself, requiring an *actus reus* and a *mens rea*, but rather as a test to measure, in a sense, the extent to which the accused was conscious of his actions whilst he was perpetrating

them. In other words, participation in an affray is here being considered from a subjective point of view, and no assertion is being made that, objectively speaking, the affray constituted a full-scale *'rissa'*, implying breach of the peace, a particular number of participants, or any other kind of criminal element.

Comparing this notion of *'rissa'* with the English notion of affray, on the other hand, brings out an even deeper incompatibility; not only is affray regarded as an offence in its own right, but furthermore, it is only dealt with from the point of view of the protection of the public peace. Thus, the English concept of affray, according to Smith and Hogan,[14] does not simply refer to unlawful violence, but refers to all those acts or threats of unlawful violence accompanied by conduct that "is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety." This notwithstanding, the offence needn't be committed in a public place, and in fact no spectator need actually be present, but the possibility of fear being caused in the so-called "person of reasonable firmness" is still required.

It is also important to note that the two notions are so different that, under English law, for there to be affray, none other than the defendant need be responsible for the offence, so that, although it is necessary for there to be at least another person involved, as a victim of the defendant's unlawful violence or threats, it isn't even necessary to have two co-participants. The English offence of affray, therefore, isn't even a *'reato plurisoggettivo'*, one of the main characteristics of *rissa*.

In 1836, the Criminal law Project initiated by the Royal Commission of 1831 and terminated by that of 1832 was published. The greater part of it was Sir Ignazio Gavino Bonavita's work, and consisted, he reported, in a translation of the Neapolitan Code, corrected, where the need was felt, with the help of Sir Richardson's incomplete and never published project, and of the Ionian Code, which had also been modelled with corrections upon the Neapolitan Code (in its turn based on the French Penal Code).[15] The following is Art. 298 of Bonavita's *Progetto sul Codice Criminale di Malta*, Cap. 1, Sezione VI:

> Se in una rissa accidentale tra più individui seguisse un omicidio, od una grave offesa sulla persona, e s'ignorasse chi ne fosse l'autore, ciascuno che avesse preso una parte attiva nella rissa in opposizione della

> persona, che fosse rimasta uccisa, o gravemente offesa, sarà punita come segue.
>
> Nel case di omicidio la pena sarà quella stabilita pel colpevole di grave offesa.
>
> Nel caso di grave offesa, la pena sarà quella stabilita pel colpevole di lieve offesa.
>
> Chiunque però nel caso di omicidio contemplato in questo articolo avesse nella rissa inflitto una grave offesa sulla persona dell'ucciso, sarà punito con uno, o due gradi meno della pena cui soggiacerebbe il colpevole di omicidio volontario.

The project was published in 1836 under the name of *Leggi Penali*, and a period of time was allowed for public discussion. Unfortunately, this period was prolonged indefinitely due to various political circumstances, until finally it was decided to give the task of revising the text to Sir Andrew Jameson, who wrote and published his report in 1844. Jameson proposed the following modifications to the article corresponding to today's Section 237:[16]

> Art. 221. Clause 4th after the word "punishment" delete the word "shall" and insert the word "may" and add new clause as follows:
>
> > "These dispositions shall not apply to any person who excites "the affray for the purpose of committing homicide or great bodily harm and in "that case the offender shall be subject to the provisions of the Law with regard "to wilful homicide."

These modifications, introducing Sec. 238 in its original form, were included in the 1850 'White Paper' and subsequently in the 1854 Order-in-Council which enacted the Criminal Code. The first amendments came with Ordinance VIII of 1857, and concerned directly the provision introduced by Jameson:

> 8. The provision of the last paragraph of article 227 of the said laws *[the Criminal Code]*, is revoked and replaced as follows:
>
> "This provision shall not apply to any person, who provokes an affray or a quarrel for the purpose of committing homicide or of inflicting a severe bodily harm; and in such case the offender, if a homicide ensue, shall be punished with the punishment established for voluntary homicide, or if a bodily harm ensue, with a punishment established for such offence, with the increase of one degree."

The objective of this amendment is clear; whilst Jameson's provision, intentionally or perhaps otherwise, imposed the punishment applied for voluntary homicide even in cases where nothing more than bodily harm ensued, the amended provision imposed a proportionate punishment increased by one degree.

The next amendment was introduced in 1871, with Ordinance VI of that year. It dealt with Art. 227, today's Sec. 237, in the following provision:

> 18. After the second section of article 227 of the said laws, relative to the case of severe bodily harm, the following provision is adjoined:
>
> "In case of slight bodily harm, the punishments established for "contraventions shall be awarded."

It is unclear whether the case of slight bodily harm was left out by Sir I.G. Bonavita purposely, considering such a case would not be worth punishing, or accidentally. Whatever the case may be, the legislator seems to have forgotten to amend the opening provision in relation to the amendment, so that whilst the article started off by saying "If a homicide or a grievous bodily harm be committed ...", the rest of the article provided even for cases of slight bodily harm. This was adjusted in 1885, through Section 2 of Ordinance No. III:

> 2. The provision contained in the first paragraph of article 227 of the said laws, is revoked, and replaced as follows:

> "227. If a homicide or bodily harm shall occur in an accidental affray "between several individuals, and the actual perpetrator of the offence be "unknown, each person who shall have taken an active part in the affray, "against the deceased or against the person hurt, shall be punished as follows:
>
> "In case of homicide, the punishment shall be that established for severe "bodily harm;
>
> "In case of severe bodily harm, the punishment shall be that established "for slight bodily harm;
>
> "In case of slight bodily harm, the punishment established for "contraventions shall be awarded."

In 1900, Ordinance No. XI of the same year re-enacted Art. 227 in the form of two separate provisions, adding detail in regard to the punishments. Thus, the actual form was reached in the following manner:

> 35. The provision contained in article 227 of the said Laws is revoked, and the following are substituted therefor:
>
> "227. If a homicide or a bodily harm shall occur in an accidental affray, and the perpetrator of the offence be unknown, each person who shall have taken an active part against the deceased or against the party hurt, shall be punished;
>
> 1. In case of homicide, with imprisonment for a period not exceeding three years;
>
> 2. In case of grievous bodily harm which has produced the effects mentioned in article 209 *a*, with imprisonment for a period not exceeding one year;
>
> 3. In case of grievous bodily harm without the ef-

fects mentioned in the preceding number, with imprisonment for a term not exceeding three months;

4. In case of slight bodily harm, with the punishments established for contraventions.

"But whosoever shall, in case of homicide, have caused bodily harm on the person killed, wherefrom death might have ensued, shall be punished with hard labour from five to twelve years.

"227 *a*. Whosoever shall provoke a tumult or an affray for the purpose of committing homicide or causing bodily harm, shall be punished as follows:

1. If any person is killed, with the punishment established for wilful homicide;
2. If any person be hurt, with the punishments established for that offence increased by one degree."

One of the results of this amendment, the sole scope of which was probably to add detail to the punishments and to provide for the various forms of grievous bodily harm, was to exclude punishment in cases were the consequences amount to grievous bodily harm followed by death. However ridiculous it might seem to punish all those involved in a slight bodily harm, and not punish all those involved in a grievous bodily harm followed by death, the fact remains that such a case has nothing to do with wilful homicide, with grievous bodily harm aggravated by the circumstances mentioned under section 209 *a* or with simple grievous bodily harm. As grievous bodily harm followed by death is not mentioned, it cannot be implied as incorporated either in aggravated grievous bodily harm, as for this offence an exhaustive list of effects is provided by law, or in simple grievous bodily harm, especially since this offence is punished less severely than aggravated grievous bodily harm. And it has even much less to do with slight bodily harm. This can only lead to one logical conclusion; that the legislator here has made a very singular mistake, which would provide much food for thought if such a case were to be brought before the Courts.

The next amendment to be examined was a direct consequence of Act XLIX of 1981, which amended the Statute Law Revision Act of 1980. On the 5th

October, 1981, when the second reading of the Bill was proposed by the Hon. Joseph Cassar, and seconded by the Hon. Daniel Cremona, the former, *inter alia*, said, "Per ezempju, jekk niehdu l-emendi ghal dik li hija Kodici Kriminali, peress li l-Kodici Kriminali gie emendat ilu s-snin, fis-sens li nehhejna l-*hard labour*, baqghu xi ligijiet li jidhru l-kliem *"hard labour"*. Jigifieri dik ma taghmilx sens u allura l-Kummissjoni diga' bdiet, fejn tiltaqa' maghhom, tnehhihom." This was precisely the case with Sections 237 and 238.

Concluding Comments

The Maltese concept legal concept of *rissa* has as we have ssen a long tradition; unfortunately, though, it cannot be said that much effort has been made to keep it in line with modern legal theory. Our Constitution, in fact, provides that no collective punishment may be imposed; now, keeping in mind the fact that part of the *actus reus* contemplated under Section 237 is actually constituted by the mere *possibility* that the accused, killed or harmed a third party, as well as by the *concurring* fact that police investigations did not yield conclusive results, it is difficult to avoid the conclusion that Section 237 deals with a kind of "collective guilt". Of course, it may be argued that collective guilt does not amount to collective punishment, so that it is still possible for the judge or magistrate to take into consideration the circumstances of the participation of every single accused person independently from the rest. However, the wording of Article 36(3)(a) of the Constitution seems to exclude this; in fact it reads, "No *law* shall provide for the imposition of collective punishment." The fact that a judge or magistrate may award different punishments is a question of judicial discretion, and has nothing to do with determining whether the provisions of the law itself are *per se* providing for collective punishment or not.

The Italian Constitutional Court[17] has decided that the Italian provision is not contrary to Art. 27 of the Italian Constitution, which provides that *"La responsabilità penale è personale."* One must keep in mind the fact, however, that the Italian Constitutional provision is substantially different from the Maltese one, and in regard to *rissa* in itself, the bodily harm or homicide suffered by the victim of the brawl is under Italian formulated as an aggravating circumstance of the crime of *rissa*, and does not depend upon any external factor relative to the discovery of the actual perpetrator.

For these reasons, it is at present difficult not to entertain doubts as to the future of

Section 237. It could be amended according to the directives of Act XIX of 1991, in order to bring it in line with the provisions of the Constitution, a requirement from which it was previously exempt. On the other hand, it could be destined to be attacked and defeated on constitutional grounds, or even before the European Court of Human Rights; it could even survive both outcomes, depending upon the interpretation of Article 36(3)(a), which as seen, could exclude unconstitutionality. A further possibility is its remaining unnoticed till the next time our Criminal code is overhauled, which is what is probably bound to happen, eventually, if no case of the kind it envisages crops up in court. In any case, the student of Criminal Code will be bound to follow with interest any further developments of the concept of *rissa* as the latest events in a chequered legislative history.

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[17]Corte Costituzionale, 17th February 1971, n.21 in Giurisprudenza Italiana, 1971, Vol.I.1.923.